

**IN THE HIGH COURT OF UTTARANCHAL,
AT NAINITAL.**

**Second Appeal No. 1106/2001
(Old No. 2104/1982)**

1- Prithvi Raj Narang S/o Ishar Dass Narang,
R/o 9, Nemi Road, Dehradun- deceased.
1/1. Ashok Kumar Narang
½. Bharat Kumar Narang
Both sons of late P.R. Narang,
9, Gandhi Road, Dehradun .. Plaintiff-appellants.

Versus

1- Prem Singh Saraf S/o Lal Singh Saraf, R/o
Ghosi Gali Dehradun- Deceased.

- (i) Smt. Premwati Verma, widow of late Prem
- (ii) Inder Singh Verma S/o late Prem Singh,
- (iii) Mahendra Singh Verma S/o late Prem Singh –
deceased.
- (iv) Ashok Kumar Verma S/o late Prem Singh
- (v) Smt. Rukmani Verma, widow of late Suresh Chandra
Verma, D/o late Prem Singh,
- (vi) Smt. Rekha Devi D/o late Prem Singh
C/o Inder Singh Verma,
All residents of Ghosi Gali, Dehradun.
- (iii)/1. Smt. Geeta Verma, w/o late Mahendra Singh Verma,
- (iii)/2. Anurag Verma S/o late Mahendra Singh Verma,
- (iii)/3. Gaurav Verma S/o late Mahendra Singh Verma,
- (iii)/4/ Saurabh Verma S/o late Mahendra Singh
Verma Dependant/Respondents.

Sri Alok Singh, Senior Advocate, assisted by Ms. Mamta Joshi
Learned counsel for the appellants.
Sri Arvind Vashist, learned counsel for the respondents.

(Hon'ble B.C. Kandpal, J.)

This second appeal, U/S 100 C.P.C., has been preferred by
the plaintiff, against the judgment and decree dated 8-4-1982

passed by Additional District Judge, Dehradun, in Civil Appeal No. 78 of 1972, dismissing the appeal and upholding the judgment and decree dated 20-6-1972, passed by II Additional Civil Judge, Dehradun, passed in O.S. No. 538 of 1964, Prithivi Raj Narang Vs. Prem Singh Saraf.

2- Brief facts giving rise to this appeal are that the plaintiff Prithvi Raj Narang (since deceased) filed a suit before Additional Civil Judge, Dehradun, for injunction to restrain the defendant Prem Singh Saraf (since deceased) from interfering in plaintiff's use of R.B. Roof of Varandah of shop no. 9 Gandhi Road Dehradun shown with red in the plain map; for mandatory injunction ordering demolition of the constructions raised by the defendant on the said roof of Varandah; for possession over the said roof and for recovery of Rs. 3000/- as price of the materials. The plaintiff pleaded that he was a tenant of the defendant premises in shop No.9 @ Rs. 75/- per month rent. The shop is bounded towards north and south by public lane, towards east by Gandhi Road and West by property of one Paras Ram. In the said premises the plaintiff carried-on business in the name and style of M/S Queta Motor Cycle Co. prior to May 1964 and he had in his possession the roof of the shop and the pucca Varandah and the latrine over the roof and the staircase leading to the roof as part of his tenancy. The pucca Varandha has pucca pillars which support the roof. There was a tin-shed Varandah in front of the pucca Varandah. It is constructed by the plaintiff and was about 3 ½ feet lower than the pucca roof. In May 1964 the defendant allowed the plaintiff to replace the door-ways of the tin Varandah with steel rolling shutters over a length of 41 feet. He was also permitted to make pillar beams etc for fixing the shutters and to replace the tin roofing with R.B. roof or R.C.C. roof at his expenses. He was also allowed to use the roof of the tin Varandah after it was replaced by R.B. or R.C.C. roof and to have access to it by the staircase. The plaintiff in consideration of the above concession surrendered possession of the roof of the shop, pucca Varandah and the latrine and the

staircase and allowed the defendant to raise a second storey on the shop and the pucca Varandah.

3. The plaintiffs' further case is that in June, 1964, he in pursuance of the aforesaid agreement replaced the roof of the tin Varandah by R.C.C. and fixed a rolling shutters on a length of 42 feet after spending Rs. 5000/-. The roof has been shown in the plaint map by letters ABCF. Thereafter, the plaintiff started using the said roof for storing old cycles and other parts and by putting signboards and affixing a neon signboard in the wall of the old pucca Varandah. The plaintiff used the staircase for access to this roof. The defendant while raising double storey on the roof of the shop and the old pucca Varandah, on 5.12.64 started removing the materials of the plaintiff on the roof ABCDEF and making a brick wall on it. In spite of plaintiff's objection and taking advantage of Sunday holiday on 6.12.64 completed the structure of wall and laid a lintel roof at the height of about 3 feet from the roof of the Varandah ABCDEF. The plaintiff also filed suit for temporary injunction in which the defendant was restrained from making further constructions over the roof ABCDEF. However the defendant got an ex parte order in appeal from the court of Civil Judge on 23.12.64 and made constructions over the roof ABCDEF and also removed and took possession of the Dunlop neon sign board and other articles including 23 second hand wheels, 9 second hand bicycles, 13 old G.I. sheets, 7 small sign boards and some old timber worth Rs. 3000/-, hence the relief of recovery of possession and a sum of Rs. 3000/- was added by amendment.

4. The defendant contested the suit with allegations that the plaintiff was a tenant only of the middle portion of the ground floor of the premises in suit and the north-eastern portion of this shop was in the tenancy of Dwarka Das and southern-western portion in the tenancy of Mangat Ram. The plaintiff was never accepted tenant of the entire ground floor of the premises. Some time after the defendant was intimated by Mangat Ram and Dwarka Das that they had admitted the plaintiff and the partner and at their request

the rent of their respective portions was accepted by the defendant through the plaintiff, but on behalf of Mangat Ram and Dwarka Dass. In May 1964 an agreement was made between the plaintiff on his behalf and on behalf of Mangat Ram and Dwarka Das on one side and the defendant on the other side. The plaintiff surrendered the entire possession of the stair case and the roof including latrine etc and he was only entitled to use the R.C.C. roof to be constructed after replacement of the tin roof subject to the condition of the construction of the second story over the entire ground floor and the first storey. The defendant was also entitled to raise the pillars which were to be constructed by the plaintiff in the ground floor for the purpose of constructing second storey over the entire ground floor. In exercise of this right he raised the pillars constructed by the plaintiff by about 3 ½ feet to 4 feet and constructed a beam without causing any hinderance to the use of R.C.C. roof by the plaintiff. He has constricted the second storey as per plans sanctioned by the Municipal Board within the knowledge of the plaintiff and as per the agreement. The defendant also alleged that some old and worn-out tyres and cycle parts were lying on the roof and they are still there and he has not taken possession of those materials nor the plaintiff ever demanded the same from the defendant. It is further alleged that to cause nuisance by demolishing certain constructions without permission of the defendant, the plaintiff got fixed a neon signboard in the old pucca roof of the Varandah. The plaintiff was liable to remove the said signboard from the roof and vide notice dated 31.12.64 and telegram dated 3.1.65 he was required to remove the same. On his failure the same was removed by the defendant and the plaintiff was asked to take possession of the same but he did not take it. The defendant is still willing to hand it over and the plaintiff is not entitled to its price and the price claimed is excessive. The defendant has spent a lot in making the construction. The tenancy of the plaintiff has been determined and he has no right of suit. The suit is undervalued and bad for misjoinder and non-joinder.

5- On the basis of pleadings of parties, following issues were framed in the suit:-

- 1- Is the suit bad for non-joinder of Sri Mangat Ram and Dwarka Das?.
- 2- Is the suit bad for mis-joinder of caused of action?.
- 3- Is the suit undervalued and the court fee paid insufficient?.
- 4- Is the plaintiff tenant of the entire ground floor?.
- 5- Was the agreement dated 27-5-64 entered into by the plaintiff on behalf of Sri Mangat Ram and Sri Dwarka Das or solely on his own behalf?.
- 6- Is the plaintiff fully entitled to use of roof ABCDEF as shown in the 1st floor plan of the map filed with the plaint?.
- 7- Has the defendant made any construction over hanging the portion shown ABCDEF as shown in the 1st floor of plant map?
- 8- Has the defendant wrongfully withheld the property as described in para 16 of the plaint? If so, its value?.
- 9- To what relief if any, is the plaintiff entitled?.
- 10- Has the defendant contravened the terms of agreement dated 27.5.64?. If so, to what extent?.

6- The parties thereafter adduced evidence in support of their cases. The trial court on appreciation of evidence and hearing learned counsel for the parties dismissed the suit for the reliefs of injunction and demolition. However the suit was decreed for return of neon signboard by the defendant to the plaintiff and for recovery of Rs. 130/- only and for the rest amount the suit was also dismissed.

7- Feeling aggrieved, the plaintiff filed appeal before the II Additional Civil Judge, Dehradun, who vide impugned judgment and decree dated 8-4-1982, dismissed the appeal.

8- Being aggrieved by the impugned judgment and decree dated 8-4-1982, the plaintiff has preferred the second appeal before the Allahabad High Court, which has been transferred to this court, after creation of new State.

9. After receipt of record, this court framed following substantial question of law in the appeal, as the appeal was admitted in the Allahabad High Court but no substantial question of law was framed there:-

“Whether the right to use the first floor construction by the defendant was dependent upon the use of the roof mainly of the newly constructed Varandah in pursuance of the agreement dated 27th May, 1964, entered into between the parties?.

10- Heard learned counsel for the parties and perused the record.

11- Learned counsel for the plaintiff-appellant has argued that both courts below have committed legal error by traveling beyond the pleadings, and admission made by the defendant-respondent in the written statement. It has also been submitted that both the courts below have further committed an illegality by taking into account the inadmissible evidence beyond the contents of agreement dated 27-5-1964 entered into between the parties.

12. Learned counsel for the defendant-respondent has made the rival submissions by placing the argument that the agreement dated 27-5-1964, which is Ext. 18 on the record, has been properly interpreted and read by both the courts below. It has further been submitted that the plaintiff-appellant in fact had no case for seeking injunction in his favour, hence both the courts below have rightly dismissed the suit.

13- The record reveals that the plaintiff-appellant filed the present suit on 7-12-1964 initially for perpetual injunction, restraining the defendant-respondent not to interfere in any way over the R.B. roof (which was constructed by the plaintiff-appellant on his own expenses replacing tin-shed), shown in red colour in the plaint map. The plaint was further amended with an addition to seek the relief of mandatory injunction and recovery of damages since the defendant-respondent succeeded in raising construction over the disputed replaced R.C.C. Varandah having obtained stay order from the appellate court in the appeal filed against the exparte injunction granted in favour of the defendant-respondent.

14- The record further reveals that the trial court in order to adjudicate the controversy between the parties framed as many as 10 issues and out of all the issues, issue Nos. 6, 7 and 10 are important, which center rounds the controversy in this case. The issue Nos. 6, 7 and 10 are being reproduced here as under:-

6- Is the plaintiff fully entitled to use of roof ABCDEF as shown in the ist floor plan of the map filed with the plaint?

7- Has the defendant made any construction over hanging the portion shown ABCDEF as shown in the Ist floor of plat map?

10- Has the defendant contravened the terms of agreement dated 27.5.64?. If so, to what extent?.

15. The trial court decided that the plaintiff-appellant is the tenant of the entire ground-floor of the premises No.9, Gandhi Road, Dehradun and an agreement dated 27-5-1964 was entered into by the plaintiff-appellant on his behalf being tenant thereof with the landlord/defendant-respondent. The trial court decided issue Nos. 6, 7 and 10 together and while deciding these issues raised a question as to whether plaintiff was entitled to use the roof of ABCDEF without any interruption in height above it and defendant-respondent has right to make construction over the

hanging roof ABCDEF in the map of the plaint. While giving findings on these issues both the courts below observed that the plaintiff-appellant is entitled to use the roof ABCDEF (replaced instead of tin-shed) by virtue of agreement dated 27-5-1964.

16- Agreement, Ext-18 dated 27-5-64 is an admitted document to both the parties. It is important to mention here that Ext-18 was not available on the record of the trial court, therefore, this court directed the appellant to file the same before this court in order to adjudicate the controversy between the parties. The appellant in compliance of the order passed by this court filed the certified copy of the agreement dated 27-5-1964 entered into between the parties (Ext. 18) and the counsel for the respondent did not raise any objection to the certified copy of the agreement filed by the appellant before this court.

17- In the present second appeal the controversy revolves around the interpretation of agreement dated 27-5-1964 which is Ext. 18, and in order to adjudicate this substantial question of law, it would be relevant to peruse the written statement filed by the defendant-respondent before the trial court. Paragraphs 12 and 27 of the written statement would be relevant to perused which are being reproduced hereunder:-

“(12) Para No. 11(A) of the plaint is not admitted. The plaintiff could use the roof of the replaced tin Varandah by latter from front side.

(27) That the plaintiff was aware before 27th May 1964 that the defendant has submitted the plans for the construction of second storey and under the agreement dated 27th May, 1964 the plaintiff surrendered the entire possession of the stairs-case and of the entire roof including latrine etc. The plaintiff was only entitled to the use of the R.C.C. roof (Which was to be constructed after replacement of the roof of the tin-shed) subject to the condition of the construction of the second storey over the entire ground floor and the first storey. It is wrong to allege that the defendant made any such

constructions which have deprived the plaintiff of any lawful enjoyment of any right. The defendant was entitled also to raise the pillars under the said agreement (which were to be constructed under the aforesaid agreement by the plaintiff in the ground floor) for the purpose of constructing second storey over the entire ground floor. The defendant under his rights, raised the aforesaid pillars, about 3 ½ feet to 4 feet for the purpose of the construction of the second storey and constructed a beam without causing any hindrance to the use of the roof of the replaced tin shed and further constructed the second storey as per plans sanctioned by the City Board.”

18- From perusal of the aforesaid paragraphs, it is quite clear that the defendant-respondent in the written statement has admitted that the plaintiff-appellant can use the roof of the tin Varandah. Paragraph-27 of the W.S. further indicates that the defendant-respondent has also admitted that the plaintiff-appellant was entitled to use R.C.C. roof (which was to be constructed after replacement of tin shed) and the defendant-respondent was entitled to raise the pillars which were to be constructed by the plaintiff-appellant in the ground floor, for the purpose of constructing second storey over the entire floor.

19- From the perusal of the agreement Ext.18, it is quite clear that the premises No.9 Gandhi Road, Dehradun was having linteled roof over it with two Varandah, one is R.C.C. Varandah on the level of linteled roof, second is the tin shed Varandah about 3 ½ feet lower than the linteled roof of shop No.9. It is an admitted fact that the plaintiff-appellant/tenant was permitted to replace the tin shed Varandah by R.C.C. roof and to replace the doorways by raising the pillars in front of tin shed Varandah. It is further admitted fact that the plaintiff-appellant was given right to use R.C.C. replaced roof (instead of tin shed) and the defendant-respondent/landlord was permitted to raise further construction over the roof of shop. It is further admitted fact that the defendant-respondent has raised the construction over the roof of the shop and

has also raised construction over newly constructed replaced R.C.C. roof (instead of tin shed) after leaving 3 ½ feet height thereon. Both the courts below have recorded the finding that the plaintiff-appellant/tenant can use the R.C.C. roof of replaced tin shed Varandah only upto a height of 3 ½ feet and after 3 ½ feet defendant-respondent had rightly raised construction over projection.

20- Neither the agreement dated 27-5-1964, Ext. 18, nor the pleading of defendant-respondent in the written statement, quoted above, indicate anywhere that the plaintiff-appellant is entitled to use ABCDEF upto the height of 3 ½ feet and after that the defendant-respondent has any right to raise the construction. The agreement dated 27-5-1964 indicates that the defendant-respondent can raise pillars for the construction of the second storey only meaning thereby the respondent is not entitled to construct first storey over ABCDEF after leaving height of 3 ½ feet only. The agreement further indicates that in case if the defendant-respondent in future wants to construct second storey over the roof of the shop, he can raise pillars upto second storey for projection thereon.

21- In view of the discussions made above, I come to the conclusion that the findings recorded by both the courts below, are perverse and against the agreement dated 27-5-1964, as well as the averments made by the defendant-respondent in paragraph Nos. 12 and 27 of the W.S. Any evidence or suggestion contrary to the written agreement dated 27-5-1964(Ext.18) would not be permissible hence cannot be taken into account in view of Sections 91, 92 and 94 of Evidence Act. The restriction imposed by both the courts below that the plaintiff-appellant can use ABCDEF upto a height of 3 ½ feet only beneath the construction raised by the defendant-respondent over ABCDEF after 3 ½ feet, is not only illegal but against the terms and conditions of agreement dated 27-5-1964, as well as the pleadings and admission made by the defendant-respondent in paragraphs 12 and 27 of the written statement.

22- With the aforesaid observation the evidence recorded by the trial court dismissing the suit of the plaintiff-appellant as well as the first appellate court upholding the judgment and decree passed by the trial court are liable to be set aside.

23- With the result the second appeal succeeds and is allowed. The impugned judgments and decrees passed by the courts below are set aside. Consequently the suit filed by the plaintiff-appellant for mandatory injunction is decreed. The defendant-respondents are directed to demolish the construction raised by the defendant on the aforesaid R.B. roof of the Varandah of shop No.9 Gandhi Road, Dehradun, more clearly shown with red lines in the plaint map by the letters ABCDEF and the possession of the same be also given to the plaintiff-appellants within a period of one month.

(B.C. Kandpal, J.)

Dated: December 11, 2006
ISB